F. M. S. REPORTS

[APPELLATE CRIMINAL JURISDICTION]
AITKEN, J.
December 21, 1937.

PUBLIC PROSECUTOR.....Appellant.

v.

SURJAN SINGH.....Respondent.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 68 of 1937]

PUBLIC PROSECUTOR.....Appellant.

v.

CHANCHEL SINGH.....Respondent.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 69 of 1937]

PUBLIC PROSECUTOR.....Appellant.

v.

NARANJAN SINGH.....Respondent.

[PERAK MAGISTRATE'S CRIMINAL APPEAL No. 67 of 1937]

Autrefois acquit — Section 302, Criminal Procedure Code (Cap. 6)—Test of applicability.

The respondents were tried by the Magistrate for offences under section 414 of the Penal Code. They were acquitted. They were then charged under section 35 (i) of the Minor Offences Enactment (Cap. 46).

The Magistrate held that because both the previous charge under section 414 of the Penal Code (Cap. 45) and the subsequent charge under section 35 (i) of the Minor Offences Enactment were based on the same set of facts the plea of *autrefois acquit* was available to the respondents.

Held, reversing the Magistrate, that the true test is whether the acquittal on the first charge necessarily involves an acquittal on the second charge. In this case the ingredients of the two offences differ considerably and evidence to establish the commission of the one would not necessarily establish the other.

I. W. Blelloch, Deputy Public Prosecutor, for the appellant.

K. M. Coomarasamy for the respondents.

AITKEN, J.—In my opinion the learned Magistrate was wrong in accepting a plea of *autrefois acquit* in these three cases, and they must be remitted to him, with a direction that the plea of *autrefois acquit* should have been rejected and that, subject to any other defence which may be available to them, the charges against these three defendants must be heard and determined on the evidence adduced.

It would seem that the learned Magistrate held that because both the previous charge under section 414 of the Penal Code, and the present charge under section 35 (i) of the Minor Offences Enactment, are based on the same set of facts, therefore the plea of *autrefois acquit* is available to the defendants. But that is by no means the true test. The test is, rather, whether an acquittal on the first charge necessarily involves an acquittal on the second charge; and that is obviously not the case here as the ingredients of these two offences differ considerably from one another, and evidence which would establish the commission of one of them would not necessarily establish the other.

The relevant provisions of our local law are to be found in section 302 (i) of the Criminal Procedure Code which reads as follows:—

> "A person who has been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 166 or for which he might have been convicted under section 167".

On these provisions two questions arise. Firstly, could a charge under section 414 of the Penal Code have been joined with a charge under section 35 (i) of the Minor Offences Enactment pursuant to the provisions of section 166 of the Criminal Procedure Code? The answer to that question is, in my opinion, in the negative; because evidence which is admissible to prove an offence against section 35 (i) of the Minor Offences Enactment, is not admissible to prove an offence against section 414 of the Penal Code. In this connection see the judgment in *Tan Hoe Seng* v. *The Public Prosecutor* (1936) F.M.S.L.R. 135, 137, 138; 5 M.L.J. 272.

The second question is this: could the defendants have been convicted of an offence against section 35 (i) of the Minor Offences Enactment on a charge of an offence against section 414 of the Penal Code pursuant to the provisions of section 167 of the Criminal Procedure Code? Here again it seems to me that the answer must be in the negative, because this section 167 has to be read with section 166, and only applies to a case where section 166 applies. As I have already expressed my opinion that section 166 does not apply so as to enable a charge under section 414 of the Penal Code to be joined with a charge under section 35 (i) of the Minor Offences Enactment, then it follows assuming that my opinion is correct—that a defendant charged with an offence againt the first of these sections cannot be convicted on that charge of an offence against the second of them.

To summarize the foregoing, it seems to me

(1) that the defendants have not been previously acquitted of the same offence;
(2) that they have not been previously acquitted of an offence which is substantially the same as the one with which they are now charged; and
(3) that they could not have been convicted of the offence with which they are now charged at the conclusion of the previous trial.

For these reasons the learned Magistrate, in my opinion, went wrong when he allowed the plea of *autrefois acquit*; and the judgments of acquittal which he then pronounced must be set aside and these cases go back to him for trial.

Order of acquittal reversed.
Further enquiry directed.